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Re: Force Majeure Claim for Failure to Perform Work Due to Access Issues
Administrative Order on Consent for Time Critical Removal Action
CERCLA Docket No. 06-12-10
San Jacinto River Waste Pits Superfund Site near Pasadena, Harris County, Texas

Dear Mr. Cermak and Mr. Axe:

This is a response to your letters dated January 4 and 5, 2011. It is also a follow up to the Environmental Protection Agency's January 14, January 21, and January 24, 2011, Notice of Violation Letters for Respondents (McGinnes Industrial Maintenance Corporation and International Paper Company). On or about January 4, 2011, the Respondents ceased to perform all time critical removal action (TCRA) Work activities for the San Jacinto River Waste Pits Superfund Site (Site). These activities are required by the Administrative Order on Consent (AOC), CERCLA Docket 06-12-10 (AOC), which incorporates the EPA approved Work Schedule. Respondents' January 4 and January 5, 2011, letters assert that failure to reach an agreement with the Texas Department of Transportation to build and use a road on their property is a force majeure event that excuses the time requirements for the performance of the AOC Work activities. Upon careful review this force majeure claim, it is EPA's determination that Respondents are in violation of the Administrative Order on Consent, CERCLA Docket 06-12-10 (AOC), and are subject to stipulated penalties.

According to Paragraph 72 of the AOC, force majeure is an event that arises from causes beyond the control of Respondents which delays or prevents performance of Work under the AOC despite Respondents best efforts to fulfill the obligation. Respondents are required to

provide to EPA a written explanation and description of the reasons for the delay, actions taken to minimize the delay, and the rationale for attributing such delay to a force majeure event. Paragraph 74 of the AOC provides that EPA will review the claim and determine if the delay is attributable to a force majeure event. In addition, Paragraph 75 states that Respondents are liable to EPA for stipulated penalties for failure to comply with the requirements under the AOC unless excused under force majeure.

Background

The Site contains two waste pits releasing dioxin from pulp mill waste into the San Jacinto River. The eastern waste pit has sunk into the San Jacinto River. The western pit is also sinking into the San Jacinto River with two-thirds of the pit remaining above water. On April 2, 2010, EPA issued an Action Memorandum (Action Memo) determining that the release of dioxin into the San Jacinto River presented an imminent and substantial endangerment (ISE) to public health, or welfare, or the environment. On May 11, 2011, EPA entered into an AOC with Respondents requiring Respondents to develop the potential removal alternatives and the ensuing TCRA Work Plan (WP) for implementation of the TCRA. In accordance with the AOC, Respondents proposed on June 17, 2010, and EPA selected on July 28, 2010, placement of a granular cover over both the submerged eastern waste pit and the land based western waste pit. Respondents developed and EPA approved with modifications the TCRA WP on November 8, 2010. The original Work Schedule is included in the Appendix D of the AOC as part of the Statement of Work which was signed on May 11, 2010. The EPA approved in writing the amended Work Schedule on December 15, 2010.

The TCRA Work activities are for the construction of the Armor Cap for the eastern and western waste pits along with the Site Management Activities that accompany the Work. The TCRA WP details the construction of the Armor Cap requiring placement of a geotextile over the submerged eastern waste pit and the submerged portion of the western waste pit and placement of a geomembrane over the land portions of the western waste pit. Work on the eastern pit will utilize a materials barge with a mounted excavator or crane and marsh buggy earthwork equipment. Work on the western waste pit will utilize front end loaders, dump trucks, and bulldozers. Equipment and materials needed for the western pit will be delivered to the pit via the proposed TX DOT access road. A laydown area separate from the site is also required for in the TCRA WP for the storage of the materials and equipment while the TCRA work is being conducted.

Respondents are seeking to excuse all TCRA activities under the AOC required to be performed from January 5, 2011 through the completion of the TCRA, September 2, 2011.

The EPA cannot excuse TCRA Work activities that are not related to the alleged force majeure event. Respondents allege that their inability to enter into an access agreement with TX DOT was the event that gave rise to a force majeure on January 5, 2011, preventing Respondents from conducting all subsequent TCRA Work activities. According to the Work Schedule, Respondents are required to begin placement of the Armor Cap over the eastern waste pit that has sunk into the San Jacinto River. According to the RAWP, work on the eastern waste pit requires a barge with a mounted excavator or crane to be staged adjacent to the work area according to Respondents. The barges containing the equipment and materials will travel to the work area via the water and will not use the TX DOT ROW to access the eastern pits. Given that the TCRA Work required for the eastern waste pit does not require TX DOT access, Respondents' nonperformance for those Work activities is not attributable to the force majeure event.

Respondents claim equipment and material cannot be transported via water to the western waste pit instead of via a road on TX DOT Right of Way.

Transportation of the equipment and material via water for the eastern waste pit is a planned activity of the TCRA WP and is available for the planned transportation of equipment and material for the western waste pit via a road on TX DOT property. According to the TCRA WP, the proposed access road on TX DOT right of way is needed for transportation of the geomembrane, aggregate, and equipment (front end loaders, dump trucks, and bulldozers) in order to construct the cover for the western waste pit portion that is above water. The geomembrane, aggregate, and equipment for the western waste pit can be transported via the water in lieu of a proposed access road. In response to EPA's November 2, 2010, letter reminding Respondents that transportation of equipment and materials for the western pit via the water is an option that is available to Respondents, Respondents drafted a November 1, 2010, Water Access Memo describing the added time and increased environmental, health, and safety risks and declined to consider transporting equipment and materials for the western pit via the water.

Respondents concerns can be addressed and managed in a safe way so that the equipment and materials can be transported to the western waste pit. (For detailed explanation see Enclosed EPA Response Memo addressing Respondents November 1, 2010, Water Access Memo concerns.) Currently, there is some flexibility in the EPA approved Work Schedule to minimize the impact of any additional time that may be needed if delivery for the western pit Work is done via water. In addition, the environmental, health, and safety risks for transporting equipment and

materials to the western pits via the water are the same for the Work on the eastern pit in the water. The EPA has in place mitigation measures minimizing these risks for the water removal Work planned for the eastern pit. If the work can be conducted on the submerged eastern pit with mitigated risks, then transporting equipment and materials to the western pit via the water can be managed, too. Thus, nonperformance by Respondents of TCRA Work because of failure to enter into an access agreement with TX DOT to transport equipment and materials via property to conduct Work on the western pit, is not a force majeure pursuant to the AOC claim.

Respondents agreed to perform the Work and participated in the Work planning activities. Respondents were fully aware that access was required and that water work would be necessary to comply with the Work activities.

Respondents insisted on negotiating the access agreement with TX DOT in an incremental approach preventing performance of their TCRA Work obligations. The Respondents delays in defining the description and location of the access directly contributed to the noncompliance with the AOC.

The TX DOT property was identified as a potential access point to the waste pits because it is the only land abutting the San Jacinto River and the southern side of both waste pits. The TX DOT property is a tiny strip of wetlands consisting mostly of the support structure of an interstate highway overpass leaving little room to build Respondents proposed road. The TX DOT property is prone to flooding and is slowly sinking into the river. There are gas and utility lines beneath the surface of the TX DOT property that can only sustain a certain amount of weight. In addition, the TX DOT property is within the boundaries of the RI/FS study area already being conducted by Respondents under a Unilateral Administrative Order (UAO). Because TX DOT property has many physical limitations and is within the RI/FS Study Area, Respondents construction description and map of its location are integral in determining if a road on TX DOT property is possible. Respondents had plenty of time, almost five months, to provide EPA and TX DOT with the preliminary map and specs of the proposed road during the access negotiations. The final map and specs were not provided to EPA until after Respondents stopped all TCRA Work activities.

Prior to entering the AOC, Respondents were notified that sampling had to be taken on TX DOT ROW as part of any access agreement. Respondents spent a month discussing with TX DOT and EPA on the best approach to sampling the TX DOT ROW before submitting a sampling plan for review. Respondents spent the next month negotiating the sampling plan. Respondents then proceeded with discussions regarding potential consideration to be given to TX DOT for the potential to build and use a road on their property for the next five years. Then, Respondents spent another month insisting all the access agreement terms had to be agreed upon between the parties prior to Respondents implementing the sampling plan. Respondents took

two additional weeks to amend a sampling only agreement. Upon completion of the sampling agreement, Respondents awaited for the samplings results for two weeks. Respondents waited another four weeks until they receive the verified data before providing it to TX DOT and EPA. Respondents waited two more weeks to discuss the sampling results with TX DOT and EPA. Respondents then proceeded to restart discussions on the consideration Respondents plan to offer for an access road and continue discussions for another month. The EPA asked TX DOT to put in writing an access agreement outlining their consideration terms. The date for the implementation of TCRA Work activities passed. Respondents continued to negotiate with TX DOT. Respondents waited three more weeks and then stopped all Work activities invoking force majeure. Respondents then proceeded with two weeks of negotiations ending with an agreement in principle with TX DOT for access. Respondents then expanded the scope of the access agreement they were seeking. Respondents spent two more weeks negotiating the expanded scope and have reached tentative agreement three weeks after stopping all work activities. Respondents' incremental negotiation approach took nine months to complete. Three of those months were the actual negotiation for the road on TX DOT property. If Respondents had negotiated the sampling and the access road agreements concurrently then Respondents would have already reached an agreement with TX DOT and be in compliance with the AOC. Instead, Respondents are asking EPA to excuse their nonperformance of all TCRA Work activities starting January 5, 2011 and continuing through the completion of the TCRA, September 2, 2011.

Respondents had a choice on where to secure access for a laydown area. Failure to secure access for a laydown area was a direct result from Respondents' poor allocation of resources.

Respondents also have the responsibility of securing a laydown area to stage the equipment and materials to do the TCRA work. Respondents had been attempting to secure access from TX DOT for a laydown area for four months before deciding that the Big Star property would be more appropriate. Respondents attempted to secure access by telling Big Star that they are a liable party for the Site and should grant free use of their property despite the fact that liability cannot be determined until the completion of the RI/FS which is several years away. The EPA had informed Respondents in November that the Big Star property was not the only location for a laydown area and that a laydown area would need to be secured and built by December 27, 2010, in accordance with the AOC. Upon review of Respondents efforts, EPA could not determine if Respondents attempted to secure a laydown area other than Big Star. TO date, Respondents have provided no documentation to EPA of any effort to find an alternative laydown to Big Star property.

According to Respondents, best efforts to secure an agreement with TX DOT for to build a road on their property includes giving EPA updates, receiving correspondence from EPA and TX DOT, and implementing other TX DOT agreements unrelated to road access.

Respondents have not displayed diligence in their efforts to reach an agreement with TX DOT for access. Respondents' submittal of their best efforts to secure access included in the January 5, 2011, force majeure letter highlights this lack of diligence given that December 8, 2010 was the beginning of Respondents Work activities for TCRA implementation. In Respondents' letter, Respondents identify forty-three efforts in the month of December. Upon EPA review, twenty-eight of those forty-three efforts were not efforts to reach an agreement with TX DOT. Those efforts included EPA updates, receiving emails from TX DOT regarding the fencing on their property, and receiving and drafting responses to EPA disputing EPA's interpretation of Respondents access requirements (see enclosed EPA Response to Respondents Alleged Efforts in December Chart).

Fifteen of the forty-three alleged efforts in December were efforts directed toward reaching an access agreement with TX DOT. These efforts consisted of four days of contemplation regarding potential changes to the November 30, 2010, TX DOT access agreement, two days of drafting language to the agreement, two emails and one call to schedule a meeting, two emails sent to TX DOT and EPA separately with the proposed language changes, one conference call between MIMC and TX DOT, and two conference calls between Respondents and TX DOT. Of the fifteen efforts to reach an agreement with TX DOT, eleven occurred after Respondents required Work activities began. Given the looming deadline for Work activities, it is surprising that so little activity happened in the month even when one takes into account the holidays. No sense of urgency to reach an agreement was displayed in Respondents' efforts and in fact the latter part of the month was spent by Respondents disputing with EPA regarding access the pits to do the work via the water.

Respondents' claim EPA's interference derailed its efforts to negotiate with TX DOT.

The EPA took progressive steps to facilitate the access negotiations between the Respondents and TX DOT. The EPA provided all of the documents related to the TCRA action including the Action Memo, AOC, Respondents' Technical Alternative's Memo, the EPA's Decision Document, Dispute Resolution Document, and TCRA WP. In addition, the EPA had calls with TX DOT explaining the TCRA work to be performed by Respondents as well as the access required to conduct the work. The EPA had meetings with Respondents and TX DOT to facilitate development of written terms for an access agreement. The EPA met and conducted telephone calls repeatedly with Respondents to encourage them to negotiate an access agreement with TX DOT. All of these efforts by EPA helped move the negotiation process forward despite

the unsuccessful efforts by Respondents in reaching an agreement with TX DOT prior to Respondents required Work activities.

Respondents characterization of statements made by EPA employees are not reflected in the record.

Respondents make various representations in their January 5, 2011, letter regarding statements made by EPA officials. These representations do not match recollections of EPA officials. According to EPA officials, the following statements occurred.

- When asked by Respondents about indemnification of parties due to gross negligence or willful misconduct, the EPA Region 6 Deputy Associate Director stated that such terms are not generally included in access agreements that EPA enters while Respondents access agreement is between private parties and therefore those terms may be acceptable. The EPA Region 6 Deputy Associate Director of the Superfund Division did not acknowledge that TX DOT's indemnities were unreasonable and improper.

- At December 16, 2010, Community Meeting, EPA's Remedial Project Manager (RPM) did state that Respondents needed to perform the TCRA even if it was by water, helicopter, or spaceship. The EPA's RPM was explaining to the public in simplified terms that evaluating all the risks posed by the Site there are various means of transporting the equipment and materials to the Site to conduct the TCRA other than by land access.

- EPA's counsel did not state that EPA "approves" TX DOT language rather EPA counsel stated "EPA has already conveyed to TX DOT agreement with the TX DOT language (6b, 10b, and 10c) in the license agreement on Monday. In the call with you yesterday, EPA is willing to review alternative language that covers the intent of the language of TX DOT license agreement regarding remediation and indemnification for EPA input. This alternative language needs to be mutually acceptable between TX DOT and Respondents and EPA does not intend to negotiate the agreement between the two parties." This was in response to Respondents stating their dislike of the TX DOT language for 6b, 10b, and 10c of the license agreement."

- EPA's counsel does not recall making a statement that Respondents' position was "reasonable" that they don't indemnify TX DOT as well as remediation. EPA's counsel does recall that she agreed with Respondents that is "reasonable" for Respondents to include the sampling plan in the access agreement for the road on TX DOT property.

- At the November 18, 2010, meeting between EPA, TX DOT, and Respondents, the EPA Region 6 Superfund Division Director did state that EPA had reached an access agreement that contained indemnities with TX DOT, but he misspoke that the name of the Site for the EPA-TX DOT access agreement was for the Van der Horst Superfund Site. There is no access agreement between EPA and TX DOT for the Van der Horst Superfund Site.

- On November 16, 2010, EPA's RPM did state that there are technical issues with access via water. The EPA's RPM did not state that land access is critical and was not willing to put it in writing. In fact, EPA's RPM wrote to Respondents on December 30, 2010, that would assume that Respondents would do the work via the water if they did not begin work on building the access road. The EPA's RPM also did not state that it would be okay to remove water-only access from consideration due to health and safety and environmental concerns. The EPA's RPM also did not recommend to Respondents to elevate their concerns regarding water access to the EPA Region 6 Superfund Division Director. When Respondents asked the RPM who they could speak with since they were not satisfied with the RPM's response, the RPM responded that they could speak to his boss, the EPA Region 6 Superfund Division Director.

- On the September 29, 2010, call with Respondents, EPA's counsel stated that EPA would not issue an access order to TX DOT unless Respondents used best efforts to secure access for the road. For the laydown area, EPA counsel stated that there was flexibility in the location and it did not need to be immediately adjacent to the waste pits. The September 29, 2010, call is documented in writing in EPA's November 2, 2010, letter to Respondents.

- The EPA counsel did not ask TX DOT to submit in writing a signed access agreement on November 30. In fact, the EPA Region 6 Superfund Division Director asked for this at the November 18, 2010, meeting between EPA, TX DOT, and Respondents.

Respondents are in violation of the AOC for stopping all TCRA Work activities. Respondents' cite their failure to reach an agreement with TX DOT as a force majeure event that resulted from causes beyond their control and prevents them from performing the TCRA Work activities after January 5, 2011. The EPA cannot excuse TCRA work activities for the eastern waste pit because these planned Work activities do not require an access agreement with TX DOT for implementation. The EPA cannot excuse performance of the TCRA work activities for the western waste pit because the transportation of equipment and materials via an access road can be done via the water. In addition, the EPA cannot excuse Respondents' stopping all TCRA Work activities on January 5, 2011 because Respondents' alleged force majeure event, failure to reach an access agreement with TX DOT, was a direct result of Respondents' incremental approach to negotiation the terms of access and not an event beyond their control. Because Respondents' stopped all Work activity not attributable to a force majeure event, Respondents'

are liable for stipulated penalties for each Work activity not started or completed in accordance with the Work Schedule under the AOC.

If you have any questions, please contact me at (214) 665-2157.

Sincerely,

Barbara A. Nann
Assistant Regional Counsel

Enclosures